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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 531

EARL P. COOK,

Appellant,

vs.

BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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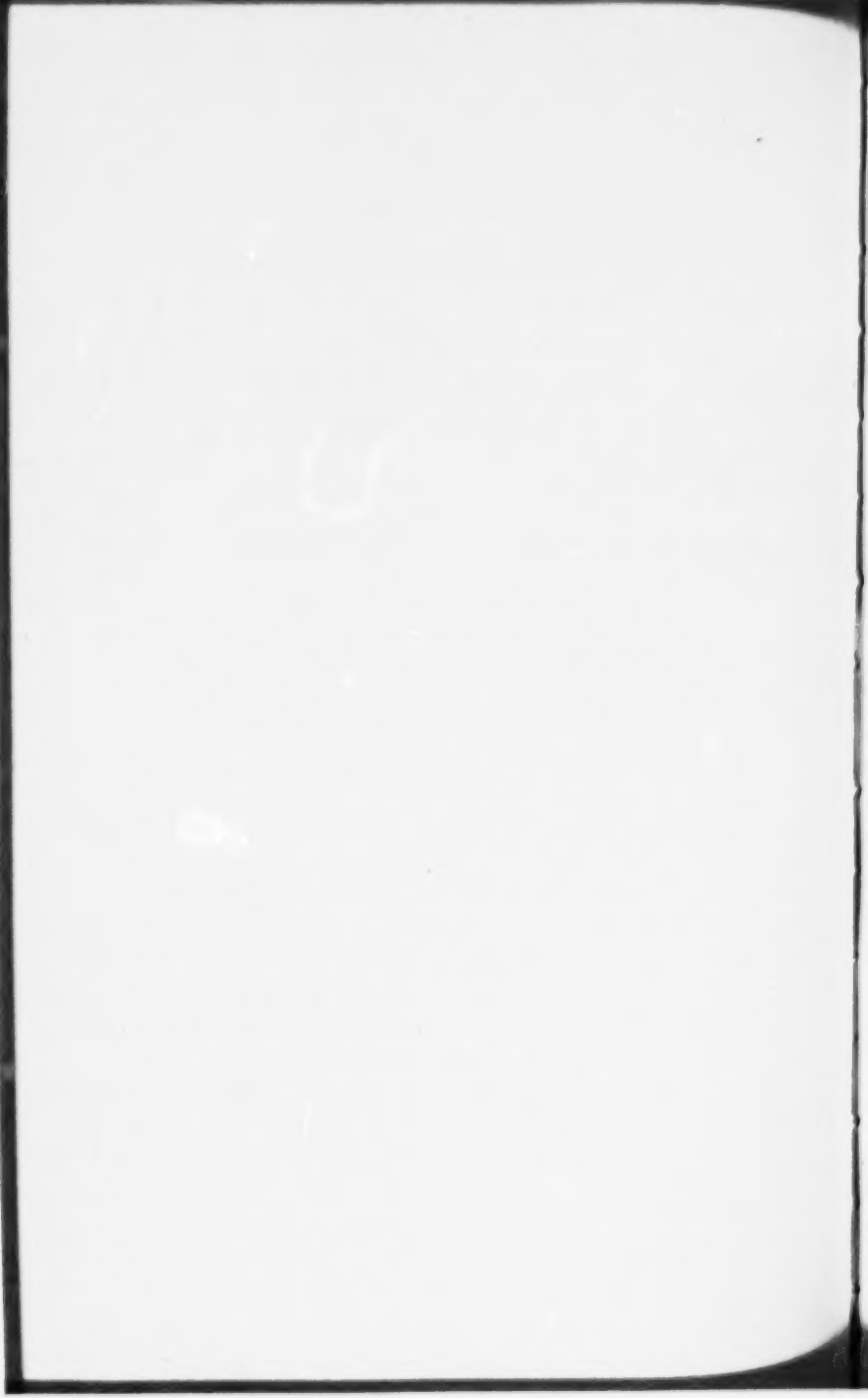

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 3012

EARL P. COOK,

Plaintiff,

vs.

BEN W. FORTSON, JR., AS THE DULY APPOINTED, QUALIFIED, AND ACTING SECRETARY OF STATE OF THE STATE OF GEORGIA; J. LON DUCKWORTH, CHAIRMAN OF THE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA; GRACE CANNINGTON, SECRETARY OF THE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA; AND THE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA, AN UNINCORPORATED ASSOCIATION,

Defendants

STATEMENT BY APPELLEES OF MATTERS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

MOTION TO DISMISS OR AFFIRM

To the Spreme Court of the United States:

Come now the appellees, defendants in the above styled cause, pursuant to Rule 12, Paragraph 3 of the Supreme Court of the United States, within fifteen (15) days from the service of the notice of appeal and appellant's statement to the jurisdiction, and file this their statement of

matters making against the jurisdiction of the Supreme Court of the United States to review the order or decree appealed from, and, as a part thereof, their motion to dismiss or affirm, and show:

1. The record fails to present a substantial federal question.

The vital portion of the law in this case under attack is set forth in Section 34-3217 of the Civil Code of Georgia of 1933 as follows:

"Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nomination for members of Congress, judges of the superior courts, solicitors general, members of the General Asembly and county officers; and this law shall not be construed to require a primary for any of the last-named officials, except in their respective districts, circuits or counties, as provided by law: Provided, however, that primaries for nomination of members of Congress, judges of the superior courts, solicitors general and members of the General Assembly shall be held on the date named in section 34-3212 for primaries for United States Senator, Governor, Statehouse officers, Justices of the Supreme Court and Judges of the Court of Appeals. (Acts 1917, p. 189.)"

The complaint alleges (Complaint, par. 2) and the undisputed evidence shows (Bill of Ex., p. 7) that on May 2, 1946, the State Democratic Executive Committee in formulating its rules provided as follows:

"Insofar as the Primary relates to the nomination of candidates for Congress from various Congressional Districts, such candidates shall be voted for only in the counties comprising their respective districts; and the Congressional Democratic Committee of each District

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shall determine whether the county unit or popular vote plan shall prevail."

The complaint alleges that the Fifth District Democratic Executive Committee adopted the county unit plan (Complaint, par. 2) and the undisputed evidence shows (Bill of Ex., pp. 13, 14) that the Congressional Democratic Executive Committee of the Fifth Congressional District of Georgia on May 3, 1946, adopted a rule providing as follows:

"A candidate receiving a plurality of the votes cast in a county shall be entitled to the unit vote for said county and the candidate receiving a majority of the county unit votes cast in said primary in said District shall name delegates from each county in the District to a convention of delegates to be held in the City of Atlanta, Georgia, on Saturday, July 27, 1946, at 11 o'clock A. M. in the Senate Chamber of the State Capitol. The delegates so appointed shall go to the convention and declare as the nominee the candidate who receives a majority of the County Unit votes cast in said primary.

"The number of delegates from each county shall be twice the number of representatives which said county has in the House of Representatives of Georgia.

"When said delegates have assembled in convention, they shall organize by the election of such officers as such convention may deem necessary and shall then proceed to declare as the nominee for Congress from the Fifth Congressional District the candidate receiving the majority of the County Unit votes cast in the primary."

The gist of the Georgia laws under attack is that they do not require any party to hold a primary, do not require a party candidate to be in any case chosen by a primary, nor require the state to pay the expenses of a primary if a party calls one; and they permit persons not chosen by any party

to have their names put on the official ballots at the election. *Chapman* v. *King*, 154 F. 2d 460, 463.

The complaint attempts to build a strawman, asking this court to take a discretionary congressional party rule for the nomination of a congressional candidate by the Democratic Party in the Fifth District of Georgia and engraft it onto the rules of the State Democratic Executive Committee as a party requirement of the state party organization which in turn it seeks to have engrafted onto the state law as a part of the state law and then attacks the local congressional party rule thus engrafted onto the law as being violative of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

It, therefore, affirmatively appears both from the petition and the undisputed evidence in the record that if complainant had been denied any right, which, of course, is not admitted, the denial was not by any act of the State of Georgia or the result of any law or statute of the State of Georgia, but was purely the action of a committee of a political party in a purely political matter.

It, also, affirmatively appears, from the code section above quoted and from the full law pleaded by complainant in the cause, there not only is no primary required but in the case of nominations for members of Congress by political parties, the statute specifically provides: "Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nominations for members of Congress * * *."

Unless the rights claimed to be denied by the complainant are rights denied to him by the State, the prohibitions set up in the Fourteenth Amendment do not avail the complainant and no substantial federal question is presented.

Cases believed to sustain this contention are: Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 835; *In re Virginia*, 100 U. S.

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339, 25 L. Ed. 676; *Iowa Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 76 L. Ed. 265; *Snowden* v. *Hughes*, 321 U. S. 1, 88 L. Ed. 497.

2. In the First Defense set out in the answer of appellees, and the facts therein set forth appear in the record without dispute, defendants alleged that complainant in this cause on the 2nd day of August, 1946, filed an identical suit against each of these same defendants jointly in the District Court of the United States of the Southern District of Georgia which suit was directed to the Augusta Division and which bore Number 160 of the Brunswick Division out of said Southern District of Georgia. Defendants contended that the present suit should be abated because of the pendency of the former action.

We contend that where two petitions are in substance the same, a dismissal of the second suit is proper on a plea in abatement.

We believe this rule of law is supported by the case of:

Francis v. *United States*, 5 Wall. 338, 18 L. Ed. 603.

3. The rights asserted by the appellants are purely political, and the questions involved are purely political questions. Whether or not the complaint presents a justiciable controversy, equity is without jurisdiction to enforce a purely political right. This is especially true of federal courts of equity.

Cases sustaining this contention are:

In re: Sawyer, 124 U. S. 200, 31 L. Ed. 402;

Walton v. *House of Representatives*, 265 U. S. 490, 68 L. Ed. 1116;

Taylor v. *Beckham*, 178 U. S. 548, 570, 44 L. Ed. 1187, 1195;

Giles v. *Harris*, 189 U. S. 475, 47 L. Ed. 909;

Lane v. *Wilson*, 307 U. S. 268, 83 L. Ed. 1281;

Colgrove v. *Green*, — U. S. —, 90 L. Ed. 1212.

The rule that a federal court of equity is without jurisdiction of political questions, or to enforce political rights, is so firmly established that the Supreme Court ought not to allow an appeal presenting such a question.

The amendment of appellants, hereinafter referred to, but emphasizes the political nature of the question presented.

4. The declaratory relief prayed for cannot be granted, because the case is not one appropriate for the grant of equitable relief.

Great Lakes Dredge & Dock Co. v. *Huffman*, 319 U. S. 293, 87 L. Ed. 1407;

Colgrove v. *Green, supra.*

5. No effective relief could now be granted to appellants by this Court or by the trial court, because the only prayer left in the complaint relates to a subject-matter of which the federal courts are without jurisdiction and seeks relief they are without power to grant.

All of the questions presented by the original complaint were moot at the time of the hearing before the statutory three-judge court. The original complaint sought to enjoin the Chairman and Secretary of the State Democratic Executive Committee from certifying the result of the July 17th primary to the Secretary of State. This certification had been made on August 5, 1946, and the complaint was filed August 8, 1946. Manifestly the court could not restrain an act which had been done before the suit was filed.

The complaint also sought to enjoin the Secretary of State from sending out the ballot forms to the ordinaries. This had been done, as required by a state law which is concededly valid, when the case was heard.

Consequently every question presented by the original complaint had become moot in the trial court and is now

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moot. No relief can be granted appellants with respect to these questions.

Mills v. *Green*, 159 U. S. 659, 40 L. Ed. 293;
Blackman v. *Stone*, 17 F. Supp. 102, 300 U. S. 641, 81 L. Ed. 856;
Jones v. *Montagu*, 194 U. S. 147, 48 L. Ed. 913.

Insofar as the complaint proceeds against the Secretary of State, both with respect to the relief sought in the original complaint and that sought in the amendment, it is in purpose and effect a suit against the State, because the Secretary of State, in all that he has done or may do acts under valid State laws, which are not attacked, and, therefore, represents the State in action and liability. See in this connection:

In re: Ayers, 123 U. S. 443, 31 L. Ed. 216;
Louisiana v. *Jumel*, 170 U. S. 711, 27 L. Ed. 448;
Antoni v. *Greenhow*, 107 U. S. 760, 27 L. Ed. 468;
Cunningham v. *Macon & Brunswick RR.*, 109 U. S. 446, 27 L. Ed. 992;
Hagood v. *Southern*, 117 U. S. 52, 29 L. Ed. 805;
Pennoyer v. *McConnaughy*, 140 U. S. 1, 35 L. Ed. 363;
Cargile v. *New York Trust Co.*, 67 F. (2) 585;
New York Trust Co. v. *Cargile*, 292 U. S. 625, 78 L. Ed. 148;
Ex Parte State of New York, 256 U. S. 490, 65 L. Ed. 1057;
Worchester Trust Co. v. *Riley*, 302 U. S. 292, 82 L. Ed. 268.

The State is an indispensable party to enable a federal court to grant the relief sought by the amendment, for it is against the State itself that the decree would operate. The

state has not consented to be sued, and the Court should, for that reason, decline jurisdiction.

Missouri v. *Fiske*, 290 U. S. 18, 27, 78 L. Ed. 145, 150;
Monaco v. *Mississippi*, 292 U. S. 313, 78 L. Ed. 1282.

6. The subject matter of this controversy if reviewable at all is exclusively one of which Congress itself has jurisdiction in that Article I, Section 5 of the Constitution of the United States provides:

> "Each house shall be the judge of the elections, returns, and qualifications of its own members * * *."

7. It appears without dispute under the pleadings and the evidence that the rights asserted by appellant are purely political.

As set out in conclusions of law in the opinion of the court in this case, "If the county unit be imposed in congressional primaries, it is by party action, not by state action. But at least as matters now stand, the county unit plan is not being applied by anyone. The State Executive Committee has refused to apply it and has certified both candidates, and both are on the ballots which are being printed, and every Democrat is free to vote for his choice, and the popular vote will determine in the general election. The plaintiff and those he represents will get exactly what they claim they should have. The double certification is in effect a cancellation of the primary, as respects these two candidates."

We submit that the questions presented are too insubstantial to require further argument and the time of this court to consider them.

8. The questions presented by the complaint and the appeal are inherently without merit, frivolous, and insubstantial.

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As shown by the undisputed evidence before the court in this case, the method of nomination was that chosen by the Fifth District Democratic Executive Committee as laid down in Rule 4 (Bill of Ex., pp. 13, 14) and it determined that a nominee of the Party from the Fifth Congressional District of Georgia would be selected in the primary to be held July 17, 1946, and that the selection of such nominee would be by a convention, the delegates to which would be chosen by the successful candidate holding a plurality of votes in each county of the district and would be chosen on the basis of the county unit, assigning to each county the number of votes in the convention, twice the number of its representatives in the General Assembly.

The effect of this discretionary party rule was that in the primary the voters in each county were not voting as to who should be nominated for Congress directly, but who would have the right to name the delegates to the Congressional convention to be thereafter held which in turn would select the party nominee to represent this district in the general election to be held November 5, 1946.

In the primary Judge James C. Davis, a duly qualified candidate who had signed the party pledge and paid the required entrance fee to the secretary of the duly constituted Democratic Executive Committee, received a majority vote in DeKalb County which under the rules was a six-unit county and the majority vote in Rockdale County which under the rules was a two-unit county. Mrs. Helen Douglas Mankin who, under the undisputed evidence as stipulated before the court (Bill of Ex., pp. 14, 15), repudiated the duly constituted Democratic Executive Committee for the Fifth District of Georgia, refused to qualify with the committee, refused to sign the pledge and refused to pay the entrance fee, was never certified to the County Executive Committees of the three counties by the legal congressional committee, but nevertheless had her name placed on th ballot by the

various county committees comprising the three counties of the district, and received a majority vote in Fulton County, a six-unit county.

Therefore, it appears that even though she failed and refused to sign a party pledge and pay the entrance fee and be certified by the proper party authority of the Congressional Party committee, nevertheless when she entered her name on the ballot in the primary she was bound by the rules of the party and bound to submit to the result. However, when the election was over and it appeared that Judge Davis had received eight unit votes, and, assuming the legality of her name on the ballot, Mrs. Mankin received six unit votes, she filed a contest with the DeKalb County Executive Committee seeking to void the county unit vote in a county in which her opponent had received the majority of the votes. Her contest was heard and denied and was carried to the State Democratic Committee as provided by the rules which are set forth (Bill of Ex., pp. 6, 7, 8, 9, 10, 11). A contest committee was convened to hear her appeal but failed to decide which one of the parties had prevailed, and merely directed that both names be entered on the ballot as the party nominees in the General Election, November 5, 1946 (Defendants' answer, Eighth Defense, par. 17, subpar. j).

The original complaint sought to enjoin the chairman and secretary of the State Democratic Executive Committee from certifying both Judge James C. Davis and Mrs. Helen Douglas Mankin as nominees of the party in the Fifth District of Georgia and sought a declaratory judgment directing that only the name of Mrs. Helen Douglas Mankin be certified.

The complaint was filed August 8, 1946, after this certification had been made to the Secretary of State on August 5, 1946. It also sought to enjoin the Secretary of State from

certifying both names to the ordinaries of the various counties (the ordinaries being constitutional county officials who supervise general elections, appoint the managers at each county precinct, and have the duty of providing all necessary forms which they have printed following the forms sent to them by the Secretary of State as to state offices and adding on the same ballot candidates for local offices).

No restraining order was granted upon the filing of the original complaint.

The Secretary of State mailed the ballot forms out to the ordinaries on August 12, 1946, fourteen (14) days before the expiration of the period within which the ordinaries were required to have military ballots printed and ready for distribution for soldiers requesting the right to vote under our absentee ballot law.

The appellant amended or sought to amend his original complaint by alleging that the plaintiff was a Democrat, qualified to vote in the general election to be held in November, 1946, and that he in good faith pledged to support the Democratic candidates for all officers to be voted on for this year; that the county unit plan or county unit basis of voting in a primary election and referred to and quoted from the Committee rules "is found and embodied in Acts 1917, pp. 183, 184, and codified in Section 34-3212 of the Code of Georgia of 1933, said section being attached hereto as an exhibit, etc."; and that the county unit plan and basis as applied to the said Democratic Primary Election of July 17, 1946, for a member of Congress from the Fifth Congressional District of Georgia "by the said Committee rules and resolutions was and is violative of the provisions of the Constitution of the United States herein elsewhere set forth for all of the reasons and grounds herein elsewhere set forth." The prayer on the amendment was that the primary laws referred to in the petition as amended be de-

cleared void as they "have been or may be applied to primary elections for nomination of the candidates for office of the members of the House of Representatives of the Congress of the United States, for all the reasons more fully pointed out in the complaint hereinbefore filed."

The cause was heard before a three-judge District Court on August 16, 1946. An order denying an itnerlocutory injunction was entered August 24, 1946, and filed August 26, 1946.

Appellees contend that no substantial federal question is involved because the right of the appellants to vote in a primary for the nomination of party candidates for State offices does not arise under the Constitution and laws of the United States, but under the laws of the State.

Cases believed to sustain this contention are:

Minor v. *Happersett*, 21 Wall. 162, 170, 22 L. Ed. 627, 629;

Ex parte Zarbrough, 110 U. S. 651, 664, 665, 28 L. Ed. 274, 275;

McPherson v. *Blocker*, 146 U. S. 1, 37, 38, 36 L. Ed. 869, 878;

Guinn v. *United States*, 238 U. S. 347, 59 L. Ed. 1340, 1346;

Breedlove v. *Suttles*, 302 U. S. 277, 82 L. Ed. 252, 256.

Appellees contend, therefore, that the complaint and the appeal are frivolous and without inherent merit because the law attacked specifically provides that no unit plan of election is required; Rule 8 of the State Democratic Executive Committee specifically provides that the congressional committees should determine whether in a particular district the county unit plan or popular vote plan should be adopted; because it appears from the rules of the Congressional Democratic Executive Committee (Rule 4, Fifth District

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Rules, Bill of Ex., pp. 13, 14) that they determined as a matter of discretion that in the primary to be thereafter held that the county unit plan be adopted as the system for the selection of delegates to a convention which in turn should make the nomination of the candidate; and because it further appears without dispute from the record that after the primary election when the matter came before a contest committee set up under the rules of the State Democratic Executive Committee, the contest committee decided that under the circumstances presented, the names of both parties should be placed on the ballot at the general election (Defendants' answer, Eighth Defense, par. 17, subpar. j).

Complainant's contentions before this court are, we believe, obviously without merit; and we suggest the apt language used by Judge Arthur Powell in the decision of *Bryan* v. *State*, 8 Ga. App. 389 (69 S. E. 121), as being applicable as follows:

"A point of legal argument may be well taken, or at least plausible, for one of two reasons,—because of its inherent merit, or because it states a proposition which, while not inherently meritorious, has gained standing by reason of its announcement by some court; for courts do sometimes, if not ofttimes, announce propositions that are not inherently sound, and these unsound announcements may become precedents. As the point here presented is palpably without point, inherently considered, and as no decision from this or any other court is cited in support of it, we are led to believe that its only noteworthy characteristic is its novelty."

Wherefore, appellees respectfully submit this statement showing that the questions upon which the decision of this Court depend are so insubstantial as not to need further argument or further consideration of this Court, and appel-

lees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment by the District Court of the United States for the Northern District of Georgia.

This 30th day of September, 1946.

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